IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27358-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
SCOTT RAYMOND HALVORSON, also known as SCOTT RAYMOND REYNOLDS,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	

Kulik, J. — A jury convicted Scott Raymond Halvorson of third degree rape and second degree assault with an aggravating factor of sexual motivation. He appeals on several grounds including that the court erred by not instructing the jury that a finding of sexual motivation had to be proved beyond a reasonable doubt. We agree that the instruction on sexual motivation was error, and we remand for resentencing without the special verdict. In all other respects, we affirm the convictions.

FACTS

Testimony. The State charged Scott Raymond Halvorson, also known as Scott Raymond Reynolds, with first degree rape and second degree assault, including an allegation of sexual motivation for the second degree assault charge. In its instructions to the jury, the court added the lesser-included offenses of second and third degree rape, and fourth degree assault. The jury returned verdicts of guilty for third degree rape and second degree assault with a finding of sexual motivation.

At trial, Detective Jerry Keller testified that on April 26, 2007, he and Detective Kendall arrested Mr. Halvorson for assault. Mr. Halvorson agreed to answer their questions after waiving his *Miranda*[1] rights.

Detective Keller told Mr. Halvorson that he was under investigation for a sexual assault occurring in the early hours of April 14, 2007, and that the victim, Deborah Schulz, had given the name of the suspect as "Scott." Report of Proceedings (RP) at 156. Ms. Schulz also reported that the suspect drove a red sports car.

When first asked of his whereabouts on the night of the incident, Mr. Halvorson lied and told the detectives that he was at home from late on Friday, April 13, until the

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

morning of April 14. Mr. Halvorson repeatedly denied knowing the victim after being told her name, and approximate age, height, and weight.

Mr. Halvorson denied knowing or visiting anyone who lived near the bar named the Flame on East Sprague. Ms. Schulz lived at 2217 East Sprague at the time of the incident.

When the detective told Mr. Halvorson that his fingerprints were found on a beer bottle found inside of Ms. Schulz's home, Mr. Halvorson admitted he had been at Ms. Schulz's home and had consensual sexual intercourse with her on April 14.

At trial, Ms. Schulz testified she had been drinking with her boyfriend at a bar called the Checker Board. She then went to the Flame for happy hour and left between 5:00 p.m. and 7:00 p.m. She then attempted to buy wine but was refused service because she was too intoxicated. Ms. Schulz returned home and went to bed.

Around 1:00 a.m. to 2:00 a.m. on the morning of April 14, Ms. Schulz was awakened by a knock on the door. She testified that it was Mr. Halvorson who identified himself as "Scott from the Flame" and asked if he could park his car and use her telephone to call a cab because he was too drunk to drive. RP at 55. Ms. Schulz testified that he did not have a cell phone with him. She agreed to let him use the telephone and directed him to repark his car so it was legally parked. Ms. Schulz testified that Mr.

Halvorson had some beer with him when he came to the door.

Ms. Schulz stated that she recognized Mr. Halvorson but "didn't really know him." RP at 56.

Ms. Schulz testified that Mr. Halvorson used the telephone and then "jumped on me and started choking me." RP at 57. She asked him, "Why are you doing this" and he said, "you fucking cunt. I own you now." RP at 57-58. She testified that he continued to choke her and said "he had a knife on him and not to say a word and that he comes from a wealthy family and he is associated with the mafia, and if I say anything, that he will definitely kill me." RP at 58. He made these threats repeatedly.

Ms. Schulz said that Mr. Halvorson took off her pants and had anal sex with her for four hours. Ms. Schulz stated that she did not want to have sexual intercourse with him. She testified to crying and telling him she was sorry. Mr. Halvorson also had vaginal intercourse with her. When asked if she screamed or yelled out during the incident, Ms. Schulz testified:

> I couldn't because he said not to say nothing. And he had my face down in the bed, and so all I could do was cry and say "I'm so sorry" and that. But then when I kind of like out of body thing [sic], I became his friend so I could live, because I didn't want to die. And so I said everything is going to be okay.

RP at 60.

Mr. Halvorson testified that he met Ms. Schulz in 2006 when she asked him for a ride home after she was being harassed on the street. He told Detective Keller that he had spent the night at her home on two prior occasions without having sex and that he had "always since then wanted to have sex with Deborah." RP at 17. He drank with Ms. Schulz at her residence on at least three other occasions, the last of which was about eight months before the incident. He testified that they engaged in "[s]ome petting, some kissing" on the night that they met. RP at 242.

Mr. Halvorson testified that on the night of the incident, he went to Ms. Schulz's residence with two Budweiser Light beers and asked her if she wanted to have a drink. She agreed and let him inside. Mr. Halvorson said that they sat and drank beer for about 10 minutes. He said Ms. Schulz used his cell phone to make several calls in an attempt to acquire crack cocaine but was unsuccessful. Mr. Halvorson testified that Ms. Schulz asked him if they could "'get some crack'" to which he replied, "'I don't smoke crack . . . but I've got about 40 extra bucks I will give you to get some, if we can have some sex.'" RP at 223. He said Ms. Schulz agreed to this arrangement. Mr. Halvorson said he left at that point to buy more beer.

Mr. Halvorson testified that when he got back to Ms. Schulz's home, she asked him to repark his car, as described in her testimony. According to Mr. Halvorson, they

drank for about five minutes before he asked to have sex. He testified that she said "okay." RP at 224. Mr. Halvorson asked if they could "'do anal'" and she said, "'[y]es, as long as you be careful.'" RP at 225. Mr. Halvorson stated that Ms. Schulz asked him to choke her because it helped her to have an orgasm.

Mr. Halvorson choked Ms. Schulz while they were having sexual intercourse and said, "[i]t was like her breathing was constricted." RP at 226. He stated that at one point, "her head was like bopping up and down. I could feel the weight of it in my hand." RP at 227. Mr. Halvorson maintained that Ms. Schulz was alert during intercourse and that she said she was all right. They had vaginal intercourse for about 10 or 15 minutes. After they had sex, they went out back where she smoked, and he had a beer. He testified that she urged him to stay because he was too drunk to drive home.

Mr. Halvorson slept from approximately 4:00 a.m. until 6:00 a.m. while Ms. Schulz remained awake. Ms. Schulz testified to being in shock and not calling anyone because she feared for her life. Mr. Halverson left just before 6:00 a.m. and said he would catch up with her in a couple of days and kissed her on the forehead. He testified to leaving $40 on her nightstand earlier in the night but putting it back in his wallet before he left the apartment.

Once Mr. Halvorson left, Ms. Schulz ran down the street to the Flame. She told

the bartender she had just been raped by a guy from the Flame and the bartender called the police.

Medics arrived and treated Ms. Schulz on the scene. Officer Derek Bishop observed some redness and bruising on both sides of her neck. The police spoke with her before taking her to the hospital, though Ms. Schulz declined to have an examination done and promised to reschedule for the following Friday.

A physician's assistant (PA) from a community health clinic testified that she examined Ms. Schulz on April 17. The PA testified that Ms. Schulz had bruising around the eyes and eyelids and redness in the white of the eye. Ms. Schulz had a pelvic examination done three days later with no finding of trauma aside from bruising on her legs. Ms. Schulz's injuries were photographed on April 18, four days after the incident.

Dr. James Nania, an emergency room physician observed petechial hemorrhaging in the photographs of her eyes. The condition causes severe redness. He said that the hemorrhaging could have been caused by a punch, severe blow, or strangulation, but not by simply rubbing the eyes.

Ms. Schulz received various treatments in the months following the incident, including therapy sessions. She testified to having neck and ear problems, not being able to talk for three months, and not being able to swallow. She was still seeing a throat

specialist at the time of trial.

Jury Instructions. The court instructed the jurors that the State had the burden of proving each element of a crime beyond a reasonable doubt. The jury instructions did not include an instruction that the aggravating factor of sexual motivation had to be proved beyond a reasonable doubt.

Jury instruction 24, the concluding instruction, stated: "If you find the defendant guilty of Second Degree Assault in Count 2, please answer the question on the Special Verdict Form. You must unanimously agree that your answer is yes or no." Clerk's Papers (CP) at 30.

The jury returned a guilty verdict for the lesser-included charge of third degree rape and a guilty verdict for count 2, second degree assault. On the special verdict form, the jury answered "yes" to the question of whether the defendant committed the crime of second degree assault with sexual motivation. CP at 36.

The guilty verdict for second degree assault is dated June 17, 2008. The jurors filled out four "Inquiry from the Jury and Court's Response" forms, one dated June 17, 2008, two dated June 18, 2008, and one undated. CP at 37-40.

The undated form reads: "Why does the special verdict form require unanimous agreement on a yes or no answer and what are the implications if we cannot achieve

unanimous agreement?" CP at 40. The court did not provide a response. Another reads: "On instruction 24, the second to the last paragraph, the last sentence—is the requirement for a unanimous agreement on a yes or no answer a typographical error?" CP at 39. The court replied: "Please reread your instructions and continue to deliberate." CP at 39.

Sentence. Because Mr. Halvorson had a past conviction of first degree rape and was found guilty here of second degree assault with a finding of sexual motivation, he was sentenced as a persistent offender to life without the possibility of release.

ANALYSIS

Instruction on Sexual Motivation. This court reviews challenged jury instructions de novo and in the context of the instructions as a whole. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)). "Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. . . . It is reversible error to instruct the jury in a manner that would relieve the State of this burden." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995) (citations omitted).

RAP 2.5(a)(3) allows an appellant to raise for the first time on review a manifest error affecting a constitutional right because constitutional errors "often result in serious

injustice to the accused." *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Further, errors of this magnitude are presumed to be prejudicial. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Here, the special verdict did not instruct the jury the State had the burden to prove sexual motivation beyond a reasonable doubt.

The instruction reads in pertinent part:

> You will also be given a Special Verdict form. . . . If you find the defendant guilty of Second Degree Assault in Count 2, please answer the question on the Special Verdict Form. *You must unanimously agree that your answer is yes or no*.
>
> Because this is a criminal case, each of you must agree for you to return a verdict.

CP at 30 (emphasis added).

The State asserts that because other instructions included the State's burden, omission from the special verdict was not manifest error affecting a constitutional right. The State cites *Scott* in asserting that the constitutional magnitude exception does not help a defendant when the asserted error is harmless beyond a reasonable doubt.

The court in *Scott* explains that the exception in RAP 2.5(a)(3) is a narrow one, applying only to "'certain constitutional questions.'" *Scott*, 110 Wn.2d at 687. If the reviewing court finds the error is constitutional, "the court should examine the effect the error had on the defendant's trial according to the harmless error standard." *Id.* at 688.

The court must find that the error was harmless beyond a reasonable doubt. *Id.* at 687.

RCW 9.94A.835(2) specifically requires such proof, stating in part: "In a criminal case wherein there has been a special allegation the state shall prove *beyond a reasonable doubt* that the accused committed the crime with a sexual motivation." (Emphasis added.)

The Washington Supreme Court addressed the issue of burden of proof requirements in special verdict instructions in *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). In *Tongate*, the defendant was convicted of first degree robbery with a special finding that he was carrying a deadly weapon. *Id.* at 752. The special verdict form asked: "Was the defendant, Wayne Douglas Tongate, armed with a deadly weapon at the time of the commission of this offense? ANSWER: 'YES' 'NO'" *Id.* at 753. There was no burden of proof requirement in the instruction. The defendant objected to the instruction for its failure to indicate a standard of proof, relieving the State of its burden. *Id.* The court noted that the issue did not fall neatly within the principle that "the State must prove beyond a reasonable doubt every element of the offense charged," since the special verdict by its nature "does not set forth the elements of a crime." *Id.*

In *Tongate*, the court observed that: "Our cases involving other enhanced

punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty." *Id.* at 754. The court held that general instructions on burden of proof beyond a reasonable doubt were not sufficient for the special verdict instruction and remanded for resentencing without the special verdict. *Id.* at 756. The court concluded:

> The special verdict is a separate finding made after the guilt-determining stage of the jury's deliberations. It cannot be assumed that a reasonable jury, in the absence of an explicit instruction on the standard of proof, will understand the applicable standard to be applied to the separate finding where, as here, the fact to be found is not an element of the crime as charged.

Id.

This case is analogous to, but more compelling than, *Tongate* in that RCW 9.94A.835(2) explicitly states that sexual motivation must be found beyond a reasonable doubt.

In this case, there is evidence that the jury was confused regarding the special verdict. The jury sent two inquiries to the judge regarding the special verdict, though neither of them related specifically to the missing burden of proof requirement. It is not clear beyond a reasonable doubt that the error was harmless, as the inclusion of the burden of proof may have affected the jury's response.

We conclude Mr. Halvorson's constitutional due process rights were affected by

the omission of the burden of proof instruction for sexual motivation and the omission was not harmless error. An answer of "yes" on the special verdict form makes assault in the second degree a two-strike crime if proved beyond a reasonable doubt. Moreover, it requires a life sentence instead of the 54-month top of the standard range for both convictions.

The State was relieved of its burden of proof insofar as the jury was not instructed that a finding of sexual motivation had to be proved beyond a reasonable doubt. Because our holding on the special verdict is dispositive, we need not address Mr. Halvorson's contention that the instruction coerced the jury.

"To Convict" Instruction for Third Degree Rape. Mr. Halvorson correctly observes that the jury instructions for rape in the third degree are worded differently than the instructions for rape in the first and second degree and assault in the second and fourth degree.

Jury instruction 14 reads:

> To convict the defendant of the crime of rape in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about April 14, 2007, the defendant engaged in sexual intercourse with Deborah Ann Schulz;
>
> (2) That Deborah Ann Schulz was not married to the defendant;
>
> (3) That Deborah Ann Schulz did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct;

> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (2), (3), and (4), then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

CP at 18.

In the instructions for the other offenses, the second sentence from the passage above, beginning "if you find," includes the phrase have been "proved beyond a reasonable doubt" after the numbered elements.

This omission could be problematic if there was no other language in jury instruction 14 indicating the State's burden. However, the phrase "beyond a reasonable doubt" appears in the instruction. As the State points out, the fact that the jury did not find Mr. Halvorson guilty of first or second degree rape "leads to the reasonable inference that the jury was mindful of its task" regarding burden of proof and followed the instructions accordingly. Respondent's Br. at 11.

The instruction did not relieve the State of its burden of proof.

Instruction on the Lesser-Included Offense of Third Degree Rape. At trial, Mr. Halvorson objected to the addition of the lesser-included offenses of second degree rape, third degree rape, and fourth degree assault. The court referred to *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006) in support of its position that it "would be creating

an ineffective assistance of counsel appellate argument for the defense if he were to be convicted if the State did not give the lesser includeds." RP at 268.

In *State v. Bucknell*, this court held that third degree rape is a lesser-included offense of second degree rape. *State v. Bucknell*, 144 Wn. App. 524, 530, 183 P.3d 1078 (2008). The court cites RCW 10.61.003, which states that the jury may find the defendant "not guilty of the degree charged in the indictment" and guilty of "any degree inferior thereto." It also cites RCW 10.61.010, which states that the defendant may be convicted of the crime charged or of a lesser degree of the same crime. *Bucknell*, 144 Wn. App. at 530.

Courts also employ the *Workman*[2] test to decide when a lesser-included instruction is proper. Under that test, "a defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense (the legal prong), and the evidence supports an inference that only the lesser offense was committed (the factual prong)." *Pittman*, 134 Wn. App. at 384 (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). Mr. Halvorson argues that neither prong can be met for the lesser-included crime of third degree rape. We disagree.

The *Workman* analysis undertaken in *State v. Ieremia*, 78 Wn. App. 746, 752, 899

[2] *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

P.2d 16 (1995) applies to this case. The charge of first degree rape does not require that the perpetrator not be married to the victim. *See* RCW 9A.44.040. Rape in the third degree, under RCW 9A.44.060(1), does require that the perpetrator not be married to the victim. Because first degree rape can be committed without committing third degree rape, the latter is not a lesser-included offense under *Workman*. However, the court noted that third degree rape is clearly an inferior degree crime, even if not a lesser-included offense, and "instruction of third degree rape, as an inferior degree crime . . . was proper." *Ieremia*, 78 Wn. App. at 753.

Here, too, third degree rape is an inferior degree crime rather than a lesser-included offense. This determination triggers RCW 10.61.003, and .010, which allows the jury to consider, and the court to convict on, inferior degrees when a defendant is charged with an offense that is divided into multiple degrees. This is consistent with this court's approach in *Bucknell*. *Bucknell*, 144 Wn. App. at 530.

Mr. Halvorson was entitled to the instruction of the lesser degree offense of rape in the third degree pursuant to RCW 10.61.003 and .010. The court committed no error.

Sufficiency of the Evidence. The standard of review for a challenge to sufficiency of the evidence is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged

crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "This court does not substitute its judgment for that of the jury on factual issues." *State v. King*, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002).

Mr. Halvorson argues that there was insufficient evidence to support a conviction of third degree rape. He contends that Ms. Schulz consented to sexual intercourse. The State provided sufficient evidence allowing the rational fact finder to find beyond a reasonable doubt that Ms. Schulz did not consent to intercourse with Mr. Halvorson. Her testimony reflects that she expressed such lack of consent by words and conduct:

> A . . . [H]e jumped on me and started choking me.
> Q Where did he grab you first?
> A Right by my throat.
> . . . .
> A He kept choking me. And I told him, "Why are you doing this[.]"
> . . . .
> A Then he started choking me more. And he said that he owned me and not to do—not to say anything and do anything, that he owns me now.
> . . . .
> Q What did he do next?
> A He choked me some more and kept saying that he had a knife on him and not to say a word and that he comes from a wealthy family and he is associated with the mafia, and if I say anything, that he will definitely kill me. And that's when he flipped me over.
> . . . .
> Q Did you want to have sexual intercourse?
> A No.

RP at 57-59.

"Credibility determinations are within the sole province of the jury and are not subject to review." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). The jury in this case was provided with sufficient evidence to support a finding beyond a reasonable doubt that Ms. Schulz did not consent to sexual intercourse and that her lack of consent was clearly expressed through words and conduct. Viewing the evidence in the light most favorable to the State, the conviction for rape in the third degree should be affirmed.

Conclusion. We affirm the convictions for third degree rape and second degree assault, and remand for resentencing without the special verdict.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kulik, J.

WE CONCUR:

_____ _____
Schultheis, C.J. Brown, J.